Aerotek, Inc. *and* International Brotherhood of Electrical Workers, Local 22, affiliated with the International Brotherhood of Electrical Workers, AFL–CIO. Cases 17–CA–071193, 17–CA–075605, and 17–CA–078720

October 10, 2019

SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS MCFERRAN, KAPLAN, AND EMANUEL

On December 15, 2016, the National Labor Relations Board issued a decision in this case, finding that the Respondent violated Section 8(a)(3) and(1) of the National Labor Relations Act by refusing to hire union salts Brett Johnson, Tim Hendershot, Alan Winge, and Tom Jankowski.[1] To remedy those violations, the Board ordered the Respondent to offer each discriminatee instatement and to compensate each of them with full backpay for any lost earnings or benefits resulting from the violations.

Thereafter, the Respondent filed a petition for review in the United States Court of Appeals for the Eighth Circuit, and the Board filed a cross-application for enforcement. On review, the court enforced the Board's relevant refusal-to-hire findings, as well as the Board's remedial order with respect to Hendershot, Winge, and Jankowski.[2]

But the court disagreed with the Board's finding that Johnson was entitled to instatement and full backpay. In its underlying decision, the Board, reversing the administrative law judge had rejected the Respondent's contention that Johnson should be denied those remedies primarily because, following its refusal to hire him, Johnson had solicited a client of the Respondent to recruit its electricians from the Charging Party Union's hiring hall instead. The Board concluded that Johnson's conduct did not render him "unfit for further service."[3] The court, however, concluded that the Board's "unfit for further service" standard "was meant to excuse natural human reaction[s] to unlawful discrimination," and that "Johnson's behavior is not the type of reactive, emotive conduct [that] standard is designed to forgive."[4] The court thus held that Johnson was not entitled to instatement and full backpay.

The court did not hold that Johnson was entitled to no remedy at all, though. Instead, the court remanded this case to the Board to consider what portion of its standard remedy might still be appropriate for Johnson. In this respect, the court expressly did not pass on the administrative law judge's recommendation that Johnson's backpay should be tolled as of the date he first solicited the Respondent's client to seek referrals from the Union's hiring hall instead, as opposed to the date the Respondent first learned of that solicitation.[5]

On June 8, 2018, the Board notified the parties that it had accepted the court's remand and invited them to file statements of position with respect to Johnson's remedy.[6] The General Counsel, the Respondent, and the Union each filed a statement of position.

The Board has delegated its authority in this proceeding to a three-member panel.

Having accepted the remand, we accept the court's opinion as the law of the case. We accordingly find that Johnson is not entitled to instatement or to full backpay. Pursuant to established authority on the tolling of make-whole compensation in such cases, we will issue a new order limiting Johnson's backpay to the period running from the time of the discrimination against him until the date the Respondent became aware that he had subsequently solicited one of the Respondent's clients to accept referrals directly from the Union's hiring hall.[7] We have already determined that the initial date of discrimination was July 29, 2011.[8] The record fixes the date when the Respondent became aware of Johnson's solicitation as October 30, 2012, the second day of the hearing. Using those dates, we shall reduce Johnson's backpay accordingly.

ORDER

The National Labor Relations Board orders that the Respondent, Aerotek, Inc., Omaha, Nebraska, its officers, agents, successors, and assigns, shall take the following

[1] *Aerotek, Inc.*, 365 NLRB No. 2 (2016).

[2] *Aerotek, Inc. v. NLRB*, 883 F.3d 725 (8th Cir. 2018).

[3] 365 NLRB No. 2, slip op. at 3–4.

[4] 883 F.3d at 733–734. The court also took into account the Respondent's contention that Johnson had "directed union members, currently working for the Aerotek client, to wear listening devices to pick up trade secrets at an employee appreciation night." Id. The court inferred from Johnson's course of conduct that "he was acting in his role as a competitor to Aerotek—and not as an aggrieved discriminatee," and that this defeated his entitlement to instatement as an employee of the Respondent and to full backpay. Id. at 734.

[5] Id.

[6] On October 25, 2018, the Region issued a compliance determination letter confirming that the Respondent had complied with the Board's court-enforced order in all other respects.

[7] E.g., *SBM Site Services*, 367 NLRB No. 147, slip op. at 34 (2019); *Tel Data Corp.*, 315 NLRB 364, 367 (1994), affd. in relevant part 90 F.3d 1195 (6th Cir. Cir. 1996;) *Marshall Durbin Poultry Co*., 310 NLRB 68, 70 (1993), enfd. in relevant part 39 F.3d 1312 (5th Cir. 1994); *John Cuneo, Inc.*, 298 NLRB 856, 856–857 (1990); *Axelson, Inc.*, 285 NLRB 862, 865–66 (1987).

Members Kaplan and Emanuel apply this authority for institutional reasons in the circumstances of this case, but they would be open to reconsidering it in a future appropriate case.

[8] 365 NLRB No. 2, slip op. at 5 fn. 30.

affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days of the date of this Order, make Brett Johnson whole for any loss of earnings and other benefits, with interest as described in the judge's decision, suffered as a result of the discrimination against him, but only for the period from July 29, 2011, to October 30, 2012.

(b) Compensate Brett Johnson for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 17, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

(c) Preserve and, within 14 days of a request or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 21 days after service by the Region, file with the Regional Director of Region 17 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. October 10, 2019

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Lauren McFerran, Member

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Marvin E. Kaplan, Member

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William J. Emanuel Member

(SEAL) NATIONAL LABOR RELATIONS BOARD